

Eleanor A. DuBay, WSBA #45828  
TOMASI SALYER MARTIN  
121 SW Morrison St, Suite 1850  
Portland, OR 97204  
Telephone: (503) 894-9900  
Email: edubay@tomasilegal.com

Judge: Alston  
Chapter: 7  
Location: Telephonic  
Hearing Date: November 5, 2020  
Hearing Time: 11:00 AM  
Response Date: October 29, 2020

Attorneys for Defendant 21st Mortgage Corporation

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

In re

Jack Carlton Cramer, Jr,

Debtor,

Jack Carlton Cramer, Jr,

Plaintiff,

v.

21st Mortgage Corporation,

Defendant.

Case No. 09-15167

Adv. Proc. No. 20-01047-CMA

SUPPLEMENTAL BRIEFING IN  
SUPPORT OF DEFENDANT'S MOTION  
TO DISMISS PLAINTIFF'S COMPLAINT  
TO DETERMINE DISCHARGEABILITY  
OF POST PETITION UNJUST  
ENRICHMENT CLAIM PURSUANT TO  
FRCP 12(b)

This matter originally came before the Court on September 3, 2020 on Defendant 21st Mortgage Corporation's ("21st") Motion to Dismiss Plaintiff's Complaint to Determine Dischargeability of Post Petition Unjust Enrichment Claim Pursuant to FRCP 12(b) (the "Motion

1 to Dismiss"). At the hearing, the Court converted 21st's Motion to Dismiss to a motion for  
2 summary judgment pursuant to Federal Rule of Civil Procedure ("FRCP") 12(d), as incorporated  
3 by Federal Rule of Bankruptcy Procedure ("FRBP") 7012. In accordance with FRCP 12(d), the  
4 court allowed the parties a reasonable opportunity to present pertinent materials in relation to the  
5 Motion to Dismiss, which includes allowing 21st to file this supplemental briefing detailing the  
6 application of FRCP 56.

7 In support of this supplemental briefing, 21st relies upon the Declaration of Whit  
8 Reed ("Reed Dec.") and the Declaration of Eleanor A. DuBay ("DuBay Dec.") filed  
9 contemporaneously with the Motion to Dismiss. 21st further relies upon the Memorandum of  
10 Points and Authorities set out below, as well as the arguments articulated in its Motion to  
11 Dismiss and the reply filed in support thereof, and the records and files herein.

## 12 MOTION FOR SUMMARY JUDGMENT

### 13 I. ARGUMENT

#### 14 A. Legal Standard.

15 FRCP 56 applies in adversary proceedings. FRBP 7056. "The court shall grant  
16 summary judgment if the movant shows that there is no genuine dispute as to any material fact  
17 and the movant is entitled to judgment as a matter of law." FRCP 56. "At the summary  
18 judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if  
19 there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769,  
20 167 L. Ed. 2d 686 (2007), citing FRCP 56(c). "[T]he mere existence of some alleged factual  
21 dispute between the parties will not defeat an otherwise properly supported motion for summary  
22 judgment; the requirement is that there be no genuine issue of material fact." *Anderson v.*  
23 *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "Where the  
24 record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,  
25 there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.  
26 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "As to materiality, the substantive law will

1 identify which facts are material. Only disputes over fact that might affect the outcome of the  
2 suit under the governing law will properly preclude the entry of summary judgment." *Anderson*,  
3 477 U.S. at 248. "[W]hile the materiality determination rests on the substantive law, it is the  
4 substantive law's identification of which facts are critical and which facts are irrelevant that  
5 governs." *Id.*

6 Once the moving party has properly submitted a summary judgment motion, the  
7 burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine  
8 material issue for trial. *Id.* at 250. "In opposing summary judgment, a nonmoving party must go  
9 beyond the pleadings and, by her own affidavits, or by the depositions, answers to  
10 interrogatories, and admissions on file, designate specific facts showing that there is a genuine  
11 issue for trial." *Bias v. Moynihan*, 508 F.3d 1212, 1218 (9th Cir. 2007) (internal quotation and  
12 citation omitted). If the nonmoving party fails to make this showing, the moving party is entitled  
13 to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91  
14 L. Ed. 2d 265 (1986).

15 **B. 21st is entitled to summary judgment because there are no genuine issues of**  
16 **material fact and 21st is entitled to judgment as a matter of law.**

17 The Court should grant summary judgment in favor of 21st because there are no  
18 genuine issues of material fact and 21st is entitled to judgment as a matter of law. Plaintiff's  
19 Complaint alleges that 21st's Judgment<sup>1</sup> is void because it was entered in violation of the  
20 discharge injunction under 11 U.S.C. § 524(a)(2). 21st asserts in the Motion to Dismiss that the  
21 Complaint fails to state a claim upon which relief can be granted, as a matter of law, because: (1)  
22 the Judgment was based on an equitable unjust enrichment claim which arose after the discharge  
23 injunction was entered in the 2009 bankruptcy; (2) the unjust enrichment claim was not tethered  
24 to any contractual relationship between the parties and is a separate legal action such that the  
25 claim was not a prepetition claim barred by the discharge injunction; (3) the unjust enrichment

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<sup>1</sup> Unless otherwise noted, capitalized terms have the same meaning set forth in the Motion to Dismiss.

1 action was not an enforcement action of any personal liability on a prepetition claim and was,  
2 rather, a disgorgement of a benefit bestowed upon Plaintiff by 21st; and (4) the unjust  
3 enrichment claim could not be barred by the discharge injunction because the benefit bestowed  
4 on Plaintiff was the payment of property taxes which are given special treatment under the  
5 Bankruptcy Code and are not dischargeable. 21st's arguments are equally applicable under the  
6 standard of review for summary judgment; indeed, there is no dispute as to the material facts in  
7 this matter and, as such, 21st is entitled to summary judgment.

8 First, Plaintiff confuses the Judgment with an attempt to enforce the Deed of  
9 Trust. Contrary to Plaintiff's position, the Judgment in favor of 21st arose out of an unjust  
10 enrichment action. An unjust enrichment claim in Washington is an equitable claim distinct  
11 from a contract. See *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 160, 810  
12 P.2d 12 (1991) ("Unjust enrichment occurs when one retains money or benefits which in justice  
13 and equity belong to another."). An unjust enrichment claim under state law is "a standalone  
14 cause of action untethered from its contractual relationship" with the debtor and is not based in  
15 contract or quasi-contract. See *Umpqua Bank v. Burke (In re Burke)*, No. NC-18-1260-STaB,  
16 2019 Bankr. LEXIS 3653, \*8 (B.A.P. 9th Cir. Nov. 25, 2019).<sup>2</sup> An unjust enrichment claim  
17 does not fall within the fair contemplation test where the creditor had no knowledge of the claim  
18 prepetition and was not put on notice during the bankruptcy of the potential claim such that the  
19 creditor could challenge the discharge of that claim. *Id.* at \*15-16, following *ZiLOG, Inc. v.*  
20 *Corning*, 450 F.3d 996 (9th Cir. 2006). A claim for unjust enrichment will be found where (1)  
21 the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the  
22 circumstances make it unjust for the defendant to retain the benefit without payment. *Bailie*  
23 *Commc'ns, Ltd.*, 61 Wn. App. at 160.

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25  
26 <sup>2</sup> While this opinion was not published, it is being noted for its persuasive value since it is markedly  
similar to facts here.

1 Here, there is no factual dispute that the Judgment arose out of an unjust  
2 enrichment action.<sup>3</sup> Further, there is no dispute, and Plaintiff is now estopped from arguing, that  
3 Plaintiff received a benefit from 21st and that it would have been unjust for Plaintiff to retain the  
4 benefit without payment. Indeed, it mattered not whether any contractual relationship existed  
5 between the parties. It also did not matter for what purpose the funds were used so long as they  
6 were expended by 21st for the benefit of Plaintiff. 21st is entitled to summary judgment because  
7 there is no genuine issue of material fact that the Judgment is based on an unjust enrichment  
8 claim that was an equitable claim, untethered and unrelated to any preexisting contract between  
9 the parties.

10 Moreover, the undisputed facts confirm that the unjust enrichment claim arose  
11 after the Discharge was entered. The benefit bestowed by 21st on Plaintiff was the payment of  
12 real property taxes on and after September 27, 2012, which was more than three years after the  
13 Discharge was entered.<sup>4</sup> As explained herein, a claim for unjust enrichment is not tethered to  
14 any contractual relationship between the parties and is, rather, a separate legal action under  
15 equity. The unjust enrichment claim could not have arisen before the entry of the Discharge  
16 because 21st had not yet bestowed any benefit on Plaintiff. Indeed, at the time the 2009  
17 bankruptcy was initiated and Discharge entered, neither 21st nor its predecessor-in-interest could  
18 have known that years later sums would be expended for the benefit of and retained by Plaintiff.  
19 21st had no knowledge of the unjust enrichment claim prepetition because the sums were not  
20 expended until 2012, and there was nothing to put 21st on notice of the acts underlying the claim  
21 years later. As such, neither 21st nor its predecessor-in-interest could have challenged the  
22 debtor's dischargeability in relation to the unknown unjust enrichment claim at the time in 2009.  
23 Therefore, 21st's unjust enrichment claim was not a prepetition claim affected by the Discharge.

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<sup>3</sup> DuBay Dec. [Doc 10], Ex. 4.

26 <sup>4</sup> *Id.*, Ex. 4, p. 2 and Ex. 1.

1 Similarly, the unjust enrichment claim was not an enforcement action for personal  
2 liability on a claim, rather it was a disgorgement of a benefit bestowed upon the debtor by 21st.  
3 Importantly, the unjust enrichment claim was not an enforcement action for personal liability on  
4 a claim under the security agreement, rather it was a disgorgement of a benefit bestowed upon  
5 Plaintiff by 21st. Notably, there is no factual dispute that 21st actually expended funds that were  
6 for the benefit of Plaintiff and retained by Plaintiff under circumstances making it unjust for him  
7 to retain the benefit. 21st prevailed in the unjust enrichment action because it would have been  
8 unfair for Plaintiff to retain the benefit bestowed upon him by 21st, *e.g.*, the actual payment of  
9 the real property taxes for the benefit of Plaintiff.

10 While, as otherwise noted herein, the fact that the benefit expended by 21st was  
11 for the payment of real property taxes is not relevant, even assuming it was, property taxes are  
12 fundamentally different from other types of debt in a bankruptcy. As shown by 21st in its reply  
13 to the Motion to Dismiss [Doc 14], prepetition real property taxes can only be discharged if they  
14 arose more than one year prior to the petition date. *See* 11 U.S.C. §§ 523(a)(1) and 727(b); 11  
15 U.S.C. § 507(a)(8)(B). A debt for property taxes incurred within one year of the petition date is  
16 a priority claim and cannot be discharged. *Id.* Indeed, the Code requires trustees to pay ongoing  
17 real property taxes during the pendency of a case. 28 U.S.C. § 960. It is axiomatic that property  
18 taxes that become due after discharge in a Chapter 7 bankruptcy are not affected by the  
19 proceeding because they are related to and arise out of the priority claim and may be pursued in  
20 the usual fashion.

21 Thus, if the requirement to pay post-discharge property taxes was not discharged  
22 in the bankruptcy case, then 21st's payment of those taxes as a benefit to Plaintiff could not  
23 possibly have been discharged. This also further supports 21st's argument that it does not matter  
24 for what purpose the funds were expended, only whether Plaintiff received a benefit under  
25 circumstances which would make it unequitable for Plaintiff to retain the benefit without paying  
26 for it. The undisputed facts confirm that 21st did not pay the property taxes until 2012, more

1 than three years after the discharge was entered. Additionally, in accordance with the Code, the  
2 post-petition property taxes could not have been discharged and the taxing authority could have  
3 commenced a foreclosure of the property because Plaintiff failed to pay the taxes. Therefore,  
4 Plaintiff received a benefit when 21st paid the property taxes in order to avoid a foreclosure by  
5 the taxing authority of the real property owned by Plaintiff.

6 In any event, the issue of whether Plaintiff received a benefit has been litigated in  
7 the state court which granted the Judgment in favor of 21st, which Judgment was upheld by the  
8 Washington Court of Appeals when it affirmed the trial court's ruling in all aspects.<sup>5</sup> At no time  
9 did Plaintiff raise the Discharge in defense of the unjust enrichment claim, even though he was  
10 represented by the same attorney in both the 2009 bankruptcy and the state court action.<sup>6</sup> The  
11 reason is clear: the Discharge does not prohibit 21st's unjust enrichment claim which arose in  
12 2012, after the Discharge was entered, and was not tethered to the parties' contractual  
13 relationship.

## 14 **II. CONCLUSION**

15 Based on the foregoing, it is clear that 21st is entitled to summary judgment  
16 pursuant to FRCP 56. 21st has shown that there are no genuine disputes as to any material fact  
17 and that 21st is entitled to judgment as a matter of law. Accordingly, the Court must grant  
18 summary judgment in favor of 21st.

19 DATED: October 8, 2020.

20 TOMASI SALYER MARTIN

21  
22 By: /s/ Eleanor A. DuBay  
23 Eleanor A. DuBay, WSBA #45828  
24 edubay@tomasilegal.com  
25 Phone: (503) 894-9900  
26 Attorneys for 21st Mortgage Corp.

25 <sup>5</sup> *Id.*, Ex. 6.

26 <sup>6</sup> See generally, the docket in the underlying bankruptcy Case No. 09-15167 and DuBay Dec., Ex. 5.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on October 8, 2020 I served a copy of the foregoing  
3 **SUPPLEMENTAL BRIEFING IN SUPPORT OF DEFENDANT'S MOTION TO**  
4 **DISMISS PLAINTIFF'S COMPLAINT TO DETERMINE DISCHARGEABILITY OF**  
5 **POST PETITION UNJUST ENRICHMENT CLAIM PURSUANT TO FRCP 12(b)** by  
6 electronic means using ECF to the parties listed below:

7 Christina L Henry on behalf of Plaintiff Jack Carlton Cramer, Jr  
8 [chenry@hdm-legal.com](mailto:chenry@hdm-legal.com); [HenryDeGraaffPS@jubileebk.net](mailto:HenryDeGraaffPS@jubileebk.net);  
9 [mainline@hdm-legal.com](mailto:mainline@hdm-legal.com)

10 Rory C Livesey on behalf of Interested Party Courtesy NEF  
11 [rory@liveslaw.com](mailto:rory@liveslaw.com), [patti@liveslaw.com](mailto:patti@liveslaw.com)

12 DATED: October 8, 2020.

13 TOMASI SALYER MARTIN

14 By: /s/ Eleanor A. DuBay  
15 Eleanor A. DuBay, WSBA #45828  
16 [edubay@tomasilegal.com](mailto:edubay@tomasilegal.com)  
17 Phone: (503) 894-9900  
18 Attorneys for Defendant 21st Mortgage  
19 Corp.  
20  
21  
22  
23  
24  
25  
26